

No. 11,113

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JACK EUGENE THOMSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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A.

Jurisdiction.

This appeal is taken pursuant to the provisions of 18 U. S. C. 688 and Rule 37 of the New Federal Rules of Criminal Procedure.

B.

Preliminary Statement.

This appeal brings before this court once again the question as to the proper judicial construction of the phrase "religious training and belief" in Sec. 5 g of the Selective Training and Service Act of 1940.

The question was once before considered by this court in No. 10953, *Berman v. United States*, in which the court was divided. Petition for writ of certiorari in that case

has been filed with the United States Supreme Court. No word on whether certiorari will or will not be granted has yet been received from that court.

C.

Statement of the Case.

The appellant registered under the Selective Training and Service Act of 1940; requested classification as a conscientious objector; was so classified at one time as 1-A-0 and thereafter reclassified as 1-A; took and passed his physical examination and was found to be acceptable to the armed forces; was ordered to report to his local Board for induction but refused so to do. Thereafter he was charged under the Act, 50 U. S. C. A. App., Sec. 311, with refusing to obey a Board order, was tried before the District Judge and convicted.

Trial was held on July 12 and 13, 1945, before the decision of the United States Supreme Court in *Smith v. United States*, and *Estep v. United States*, 327 U. S. 114, 90 L. Ed. 405 (1946).

The ruling by the court below to the effect that there was no misapprehension of the law in the action of the Selective Service Agencies in reviewing defendant's classification as a conscientious objector was based on the concept that religious training and belief must mean religion as exemplified by belief in God as such and in membership in some church.

Thus, it was along these lines that the court examined the defendant [R. pp. 56-59]:

“The Court: Have you ever been a member of any religious sect such as the Methodist, the Baptist,

the Jewish church, or the Mohammedan, or the Four Square Gospel?

The Witness: No, I haven't.

The Court: Catholic or Episcopalian church, have you ever been a member of any of those?

The Witness: No.

The Court: Have you ever studied their doctrines?

The Witness: Not deeply; no.

The Court: Well, have you ever read the Bible?

The Witness: Yes.

The Court: Which Bible?

The Witness: I have read the Christian Bible and parts of the Mohammedan, the Koran I believe it is.

The Court: Do you read the Old Testament?

The Witness: Yes, sir.

The Court: When did you first begin to get these ideas?

The Witness: Well, that is hard to say. It has been a long time ago."

The appellant said that he is the only child of his parents; that his father and mother do not hold adherence to any commonly recognized religion, such as Baptist, Methodist, or any others named by the court; that he is not aware that his parents are students of the Bible; and that they never instructed him in the Bible, nor urged him to read it; nor had they ever urged him to read any other religious works or literature. [R. p. 57.]

"The Court: They have given you no religious instruction at all then?

The Witness: Not in the sense that they taught the doctrines of any of the recognized creeds, but my father especially has taught me, at least started me out on these lines, on these ideas which I now believe in, that life is sacred and that no man has a right to do an injustice to another, an injustice of any kind."

The appellant testified he had never attended with his parents any religious service, or Sunday school; and that he had never attended except "possibly once or twice." [R. p. 58.]

He first expressed himself on the subject of peace at the age of 13, when, as editor of the Bancroft Junior High School (Los Angeles, California) Paper, he wrote an essay on peace. The essay was later introduced in evidence as Defendant's Exhibit D. [R. p. 58.] (The essay appears on page 50 of the Record.)

His parents belong to no church but gave him instruction along the lines of his present belief. He stated that his father's objection to war was strictly humanitarian and the discussions they had were more or less of the nature of teacher and pupil rather than arguments. He testified that he always had opposition to war and that he regarded life as sacred. The following are excerpts from the testimony of the nature of his beliefs [R. p. 58]:

"The Court: While you are on that, you stated a while ago that the basis of your philosophy, if it may be called that, or your religious belief, is that you regard life as something sacred and you have no right to take any life which is sacred, what do you mean by a sacred gift?

The Witness: It is a gift from something beyond man, some power beyond man, and as such a gift no man has a right to touch it.

The Court: Do you in your religious belief have a concept which is equivalent to the Christian concept of God?

The Witness: Yes, I have.

The Court: What do you call it?

The Witness: Well, I never—

The Court: Do you call it God?

The Witness: I never put a name on it. It is just power. I simply thought of it and referred to it in my thoughts. I haven't discussed my religious feelings with many people, and I have not been called upon to put a name on it.

The Court: Well, in your own thinking aren't you called upon to give it a name?

The Witness: Well, God is a power that exists.

The Court: Do you regard it within the power of humans to conceive actually what this power is?

The Witness: No, I don't think so. I think that the only connection which the human mind has with God, is the manifestation of the voice of God which I think is conscience, something that gives you direction, tells you this is right or that is wrong, that you shouldn't do that."

Appellant's position is fairly set forth in his answer to the Special Form for Conscientious Objectors (D. S. S. Form 47) filed by the appellant with his local board [R. pp. 47-49]:

"1. Describe the nature of your belief which is the basis of your claim made in Series I above. (An-

swer) I am conscientiously opposed to war and killing in any form as a violation of man's innate feeling and nature and his effort to lead a better life. War's waste of life and energies destroys all man's efforts toward a better natural and spiritual life, and I can take no part in it.

"2. Explain how, when and from whom or from what source you received training and acquired the belief which is the basis of your claim made in Series I above. (Answer) I have acquired my belief against war and killing (1) from early home training from my parents (2) within the last few years thru seeing movies, such as 'All Quiet on the Western Front' and 'The Road Back.' I have fortified home training with conviction of my own.

"4. Under what circumstances if any do you believe in the use of force? (Answer) I do not believe in the use of force to kill at any time. I do not believe in capital punishment. Force may be used to restrain, for instance, an insane, when this restraint is for the good of the individual or of society.

"5. Describe the actions and behavior in your life which in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions. (Answer) As far back as I can remember, I have never had a fight. I have never been allowed to own a toy gun. I have never owned a firearm of any kind. I have been taught 'Thou Shalt Not Kill,' not only in regard to man, but in regard to wild animals. To the best of my ability, I live up to the Ten Commandments."

In the hearings before the Hearing Officer the testimony was that the appellant was sincere in his belief and was not seeking a classification as conscientious objector because of fear or because of a desire not to do his duty but rather because he inherently and fundamentally believed in his own conscience that he could not engage in war.

Even when appellant was as young as 13 years he gave public expression to this feeling of conscience then just budding and thirsting for expression in his breast. Said the appellant [R. p. 50]:

Editorial "Peace on Earth Good Will Towards Men," dated May 26, 1938, published in the Bancroft Junior High School paper, reading as follows:

"Once a year a day is set aside on which we honor those who made the last great sacrifice for our country. We commemorate their deeds and ideals. It is fitting that on Memorial day we decorate the graves of our loved ones. But they are dead, they live only in memories. However, their ideals shall live forever, the end these soldiers strove for, the end we all strove for, Peace.

"Man is naturally peaceful. Often under the influence of political bosses he may be goaded into battle against a man for whom he holds no personal dislike. He knows only that he had been told to hate and kill this man. Therefore he picks up a gun and performs legalized murder. Live for your country don't die for it! On this Memorial day let us rededicate our lives to aiding in making America a greater factor in a world peace movement."

And it appears that nonetheless he did not belong to any church, he had a feeling closely akin to the usual understanding of what "Religion" is.

In further examinations before the court the appellant testified [R. pp. 61-62]:

"A. Well, as I said, a man's conscience is the voice of God within him, and what your conscience dictates to you is a command from this Supreme Being.

Q. What is that command to you in connection with war or participation in war? A. The demand to me was 'Thou shalt not kill.'

Q. Where does that come from, the original phrase? A. The original phrase of course comes from the Bible.

Q. In other words, you do accept that part of it? A. Yes, I do."

On the subject of his religious training [R. p. 61]:

"Q. What do you mean by training you in pacifism? A. Essentially it was my father's teaching that I should live by the Golden Rule.

Q. What is the Golden Rule as you understand it? A. The Golden Rule was that I should do unto other men as I expected and wanted them to do unto me.

Q. Do you know the origin of the Golden Rule, where it first appears? A. No, I am not acquainted with that.

Q. Was it stated by some religious person, do you know? A. I know that if not the text of that, a teaching very similar to it was given by Christ.

Q. Now in this statement you said 'They (referring to your parents) taught me that full life is ob-

tained only by helping one's fellows.' Then you said, 'I am not a member of any sect, yet I look at the life of Christ as a perfect example of man's behavior towards his fellows. I know if Jesus were alive today he would stand beside me protesting against war.' Was that your opinion at that time? A. Yes.

Q. Has that been your opinion during this entire period? A. Yes, it is my opinion now.

The Court: Has it ever occurred to you that perhaps your mind might change?

The Witness: Yes, it changes all the time.

The Court: What is your objection to joining the Army and taking your chance on being assigned to non-combatant work?

The Witness: Well, I think that to come under military supervision, in any manner is to give your sanction to militarism, which I don't wish to do."

Opinion of the Court Below.

No opinion of the District Court has been published. The trial judge's reasoning in the matter however appearing in his remarks from the bench [R. pp. 66-69] in settling and allowing the Bill of Exceptions.

D.

Questions Presented.

I.

Did the District Court erroneously interpret the meaning of the phrase "religious training and belief" by restricting its meaning to the orthodox religious training by membership in a church and by a belief in an actual, material, personal "God"?

II.

Should a new trial be granted or the cause remanded because the defendant was not permitted to present as a defense evidence that he was a conscientious objector although he had submitted to all processes on the road to induction except actual induction itself?

E.

Specification of Errors.

Appellant relies upon the Assignment of Errors heretofore filed [R. pp. 19-20].

F.

Argument.

The legal issues in this case involving the same points heretofore presented to this court in *Berman v. United States of America*, No. 10953, and petition for writ of certiorari having been filed in that case with the Supreme Court of the United States, it is felt that the same arguments there urged are applicable here. The argument appears from page 7 through page 45 in Appellant's Opening Brief before this court in the *Berman* case and are hereby adopted as the argument in this case and again urged on this court.

Dated October 28, 1946.

Respectfully submitted,

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